AMENDMENT OF THE SHERMAN ANTI-TRUST LAW[1]

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Last autumn the National Civic Federation called a conference on combinations and trusts in Chicago. The presiding officer was Nicholas Murray Butler. He sounded the note of antagonism to the Sherman Anti-Trust Law, and that note was echoed throughout the three days' proceedings. I must confess I was surprised. I had no idea there was such widespread conviction that the time had come for a modification of the Sherman Anti-Trust Law. True, this law has been on the statute books eighteen years and only recently have we witnessed a movement for its modification. That is because the government has not attempted seriously to enforce it until within the past few years. We see what disaster has attended the very beginning of this attempt.

As a result of the civic federation conference there is a measure before Congress intended to correct the evils of the Sherman Anti-Trust Law. It is the Hepburn Bill. Criticisms upon the measure since its introduction into the house have led its friends to modify it in several particulars:

First, by leaving under the ban of the law the pooling of traffic by railroads while permitting reasonable rate agreements subject to the approval of the Interstate Commerce Commission;

Second, by providing for an appeal from the decision of the Commissioner of Corporations to the Interstate Commerce Commission and then to the courts;

Third, by so modifying the clause relating to labor as to remove all doubt about the boycott and blacklist still coming under the prohibition of the Sherman Law.

That law, it will be remembered, prohibits all combinations in restraint of interstate trade whether such combination be reasonable or unreasonable; it makes no distinction. Owing to the scale of business to-day there are very few combinations or agreements

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which may not be interpreted as in restraint of interstate trade. Many of them are thought to be necessary to the successful conduct of business in its present scope; *i. e.* are reasonable in their purpose and result. If the Sherman Law were impartially and generally enforced it would bring about chaos in the business world; the mere uncertainty as to whom it may strike has developed a feeling of unrest and concern which is inimical to the best interests of the country.

Rivalry is an important element of business, and crushing the competitor is a necessary coincident of rivalry. By superior organization or inventive genius a business man supplies commodities so good or so cheap as to cause a rival to retire from business. Has he done anything that is morally wrong? Quite the opposite. To a certain degree progress is actually dependent on him: crushing the competitor is simply eliminating the unfit. The public suffers only when the process has gone so far as to give a virtual monopoly to the triumphant party, because then the very instrument of good, rivalry, ceases to exist. In other words, while there is still no moral wrong, there does arise at this point a question of public expediency. It is on the ground of public expediency alone—not on moral grounds—that monopolies are to be prevented, if possible, by state interference. Certainly the public suffers by monopoly—and the duty of the government to put down monopoly is beyond question. The whole problem is the very difficult problem of discriminating action which will control, without ruining, the splendid business organizations that have done so much to give our country its prestige in the world of affairs.

Now, many of us have long believed that the most effective instrument in checking monopoly and keeping alive potential competition is publicity *i. e.* such knowledge of the affairs of a corporation as will enable the public to judge of monopolistic practices or unfair methods, and this is the central idea of the Hepburn Bill. The bill proposes to modify the Sherman Anti-Trust Law so as to exempt from the operation of the law, so far as proceedings by the United States lie, reasonable combinations in restraint of trade, including strikes and lockouts. It proposes to do this in the wisest way, in a negative way. As a condition precedent to the enjoyment of the benefits of the bill, corporations or associations for profit will be required to register and to furnish certain information

to be prescribed by the President, information relating to organization, financial condition, contracts and corporate proceedings. The Commissioner of Corporations is required to register all corporations or associations furnishing such information whether he approves of them or not. But after they are registered, they will be asked from time to time to furnish additional information, and if their future acts after registration are regarded as in unreasonable restraint of trade, the registration may be withdrawn. They will thus be constantly under the eye of the commissioner. It must be remembered that the bill is not compulsory. No corporation or association is compelled to give the information prescribed by the bill. But unless it does give it, it will continue under the ban of the Sherman Law, even so far as reasonable combination is concerned.

Now, what are Judge Grosscup's objections to this bill, as he stated them last night? His first objection is that the bill sets up one-man power. He complains that we are putting in the hands of the commissioner the power to stamp a corporation with legality. The term "one-man power" does not fit because the decision of the commissioner is not final. If his decision be adverse, an appeal lies, as already stated, to higher tribunals. If, on the other hand, his decision be favorable, the law department of the government is still permitted, under the terms of the bill, to differ with him and to proceed against the corporation on the ground of unreasonable restraint of trade. In other words, only "reasonable" combinations can be stamped by the commissioner with legality, and that at the risk of having his decision overturned by successful prosecution on the part of the law department. It is objected that we are setting up a bureau to do what should be left to the law and the courts. The answer is that the powers conferred by the bill are wholly negative. Under its provisions the bureau can deny certain privileges; it cannot institute proceedings against anyone nor confer definitely any rights upon anyone. With these limitations, limitations which make the powers quite different from those conferred upon the Interstate Commerce Commission and on the utilities commissions of the various states, there is a distinct advantage in partially substituting for a sweeping law which attempts the impossible, a tribunal empowered to discriminate and forewarn, a tribunal which can meet business methods with business methods.

The objections advanced are the cry, first and foremost, of the inefficient, who would break up the great industrial organizations of the day by maintaining and enforcing the present law indiscriminately against all combinations whether in reasonable or unreasonable restraint of trade. Their plea is that the principal object of all combinations is the control of prices. That is not true. The object of many combinations is profit, but that object may be reached by cheapening production as well as by raising prices. There are further combinations to effect objects wholly unconnected with prices or profits.

Other criticisms leveled against the bill represent the objections of employers whom the abuses practiced by labor unions have so antagonized that they would maintain the Sherman Law at any cost, with a view to curbing the ambitions of labor, and even crushing the labor unions completely. Such men fail to realize the vast benefits that labor unions have brought to society as a whole by raising wages and shortening hours. They fail to realize, moreover, that one of the conditions of a successful war on the very great evils practiced by the unions is that we start by being just to the unions as well as to labor not embraced in the unions, that we help labor to realize all its legitimate aims for its own improvement. Moreover, as Mr. Gompers has stated, to make labor unions unlawful is simply to turn them into secret societies with measureless powers for evil.

As already stated, the bill does not legalize anything unless it be reasonable combination. It operates only to suspend certain provisions of the Sherman Act. There is no intention to include the boycott in this exemption. But even if it were inadvertently so included, it could have no such result as legalizing the boycott, for the reason that conspiracy and boycott would still be under the ban of the common law in the separate states. Suing in courts of equity in all the separate states involves added physical difficulties but that is very different from saying that the bill, even though defective in this particular, would legalize the boycott.

The objection raised to the publicity features of the bill would be advanced against any form of publicity. In fact, the bill does not confer any new positive powers in this respect. Already at the present time powers of investigation are lodged in the Bureau of Corporations, and in two other active bodies, the Interstate Com-

merce Commission and the Law Department of the government. What return does the victim who is investigated by them to-day get? Anxiety of mind, habits of secrecy, and a growing hostility to government. Under the Hepburn Act, on the other hand, he would get a tangible benefit; in return for the information supplied he would be relieved of threatened fine and imprisonment for acts which are inseparable from business on its present scale.

Much of the criticism of the Hepburn Bill on this platform and elsewhere turns on the ever present question of centralized versus local government, a question uppermost in the public mind since the founding of the union, and one that is likely to remain uppermost to the last day of that union's existence. The fundamental consideration here, in connection with the problem we are discussing, is the utter failure of the state legislatures to deal successfully with that problem. It becomes clearer every day that the big corporations engaged in interstate trade can be controlled successfully only by an authority commensurate with the field of their activities. Improved communication has broken down state lines and the problem before us is the problem of interstate commerce. Moreover, is it true that with the exercise of greater powers by the federal government local activities are diminishing? Is there not rather a readjustment of activities without any loss of volume as regards local government? Are not the municipalities and the states themselves exercising powers which they did not exercise a few years ago? We see them turning their attention to such things as municipal ownership of water, gas and electric light, to the operation of street railways and to housing. We find them entering a much less questionable field than the above, such as the provision of free public baths, wading pools, outdoor gymnasiums and music. Under the police powers they are multiplying sanitary measures, including milk inspection and pure food laws, the suppression of smoke in cities, and are even dealing with the unsightly in the form of objectionable billboards. In the field of education the increase of local activity is enormous. Crowning the common school system we see to-day many flourishing state universities and even city universities, as in Cincinnati and New York. Corn trains are bringing to the farmer's door results of scientific work at state agricultural stations and for some years we witnessed a state actually

engaged in the sale of liquor. An example of a new municipal activity of great value is the sale of milk for infants, extending to its free distribution where necessary.

In some of these activities there is nothing whatever to prevent the federal government and the local governments working side by side. If there is any one thing that can and should be centralized it is the collection and dissemination of knowledge. Without a central organization there is danger of great waste through parallel effort in experiment and in collecting data, and corresponding waste in dissemination. As a people we have made up our minds once for all that vast empire, such as our home area alone constitutes to-day, can be maintained only if based upon healthy local government. But we are equally determined not to be so foolish as to endanger the system by carrying it to extreme, *e. g.* by denying to the central government power over problems which it alone can deal with successfully.

A further objection of Judge Grosscup's to this bill is that it lacks the human element. Now, what does Judge Grosscup mean by the human element? From the rest of his wonderfully able address, I gather that he means actual partnership on the part of labor in all the industries in which labor is engaged. Well, Robert Owen had his dreams about this a century ago. How far have they been found practicable?

Before I go on, I want to distinguish between cooperative production and cooperative distribution. The latter offers less difficulties than the former. The trouble with cooperative production is that while it may work beautifully in prosperous times, it fails utterly in hard times. When the laborer's dividends are reduced, he wants to know why, an early result being a demand on the part of labor for interference in the management. Now, productive industry is, in its nature, autocratic. The number of failures in the business world shows how rare is the talent that can handle big business operations successfully, and if you crowd this talent aside, the result will be a loss of intelligent direction, *i. e.* greater labor with less result.

If Judge Grosscup had said profit-sharing, that would have been quite another thing. You may have an institution like a great department store, where every salesman gets a share of the profits, and that may be permanent because the salesman has no certificate of

property which he can part with or on which he can make a legal or moral demand for interference. So long as he continues in that establishment he enjoys a share of the profits according to his sales. But even in cooperative distribution, if you attempt to make him part owner, what happens? Supposing to-day, in Mr. Wanamaker's establishment, each employee should be given certificates of stock; how long would all the employees in that establishment continue to be holders of that stock? Would not some of them sell it—have to sell it? Would not others, through their superior thrift, gather it to themselves, so that, as in most of the so-called cooperative stores to-day, you would soon have the few thrifty employees owning all the stock and becoming employers while the great mass of former stockholders had lapsed into salaried employees?

The difficulty is inherent. There are some things which are dependent on time and place; but to my mind, the participation of labor as an owner in production—not in sharing profits but as an actual owner—is inherently impossible, because it involves interference with the management, which is, in its very nature, autocratic.

Now, Judge Grosscup likewise referred to the tremendous concentration of industry in the hands of a few men. Some of us, at the beginning of this movement, said that while you would have great fields of industry gathered up by a few men, the net result, provided always there is adequate regulation—I lay down that one condition, provided you have adequate regulation—the net result would be less waste of human energy, *i. e.*, cheaper things or better things for the same money, so that, in the long run, human effort would be more and more freed from the necessity of producing the material things—the things which enable men to *exist*—and be set free for the higher things, the things which enable men to live.

Now what are the indications? Statistics of 1900, compared with 1890, show increase of diffusion, and despite the caution of the Census Bureau that this showing is due to completer canvass, some very good authorities believe that the diffusion is real. The statistics of manufactures for 1905 throw no light whatever on the tendency in question for the reason that they exclude the bulk of the smaller "neighborhood and mechanical" industries (three-fifths of all the grist mills and nearly one-third of all the lumber mills in the country, for example, being thrown out from the enumeration), and

for the further reason that the census does not pretend to include the professions.

Industries which lend themselves to combination are not likely ever to be broken up unless the legislator deliberately sets to work to hamper them. On the contrary, means are likely to be found from time to time to successfully combine industries which perhaps cannot be combined to-day. The point is that this very process, aided by the growing conquest of nature in every direction, will so cheapen production as to set free the activities of a large body of the people, as already stated, for higher pursuits. These higher pursuits may take the form either of handiwork to which some feeling and character will be imparted by the individual workman, a demand for which is likely to be brought about by growing wealth and culture, or of important accessions to the professions. You may have more school teachers, painters and sculptors, more men to let imagination range in the walks of letters, more men to devote their time to the science of government.

We all realize the many drawbacks that have come with the factory system. The tendency to which reference has been made will off-set these disadvantages. While there are indications that this tendency has already set in, it will naturally be a long time, possibly several generations, before it will become important. This is perhaps an optimistic view but it is an optimism which I believe to be based on a correct reading of human history.

When we analyze monopoly we find it of three principal kinds; that which has been termed "monopoly of excellence," which is better or cheaper service and goods; monopoly based upon government favor, such as a patent or franchise; and monopoly based upon control of the supply of the raw material. No other form of monopoly can be permanent.

Now, publicity will go a long way toward dealing with the abuses practiced by these monopolies. Even monopoly which starts as "monopoly of excellence" may, after it has cleared the field of rivals, resort to exactions and become oppressive. It then becomes the duty of the state to reintroduce the possibility of competition by making it difficult for the monopoly to cut prices in a restricted area with a view to killing off incipient competition while making large profits from a maintenance of price elsewhere. We are probably not yet prepared to say to the industrial corporations that

they must follow the rule of public utilities and have one price for all comers; but if by publicity we can show great discrimination in price, public opinion is likely, in the long run, to succeed in breaking up the practice. For monopoly based upon government favor, the obvious remedy is foresight, *i. e.* proper conditions laid down when the franchise or patent is granted.

The third kind of monopoly, that based upon control of the supply of raw materials, is the most difficult to deal with. Possibly there is no remedy for it except government ownership, under which such things as mines could be leased on a royalty (not operated) by the government. Such a system would place the government in control of the situation, and publicity—the publicity we are seeking to set up under the Hepburn Bill—would show exactly what are the problems we have to deal with. To amend the Sherman Law by simply inserting the word "unreasonable" would accomplish some of the objects aimed at by the present bill, but we would be throwing away the opportunity to secure publicity of a large kind, to secure it in a negative way—not compulsory—and under a system which would be automatic and would not depend on the initiative of any department or official. This device would of course result in a much greater volume of publicity than at present, and the objection that information so given to the central government might be seized upon by the separate states and used as the basis of prosecution under state statutes, is a serious objection. It is in fact the one serious objection advanced against the bill. An answer to it has not yet been found, and it is highly desirable that one should be found because the same objection would hold against any conceivable plan of publicity under the federal power.